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No. 87-609

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SHELL OIL COMPANY,

Appellant,

v.

DIRECTOR OF REVENUE OF MISSOURI,

Appellee.

On Appeal From The Supreme Court of Missouri

APPELLANT'S REPLY TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Shell makes the following response to the *amicus curiae* brief the United States has filed in support of imposition of the taxes in question.

A. The Interstate Nature Of The Sales.

The argument of the United States that Shell is purely an in-State seller and that the sales in question are intrastate contradicts the stipulated facts and strains both logic and law. Moreover, the position it advances would preclude a finding of interstate commerce in those situations, such as this one, in which goods sold by a middleman are shipped directly from his supplier in one state to

his buyer in another. Such a position contradicts this Court's previous decisions.

Shell's role in the sales at issue is essentially that of a middleman, or broker. Shell never physically possesses the fuel. Through its exchange agreements with Amoco Oil Company, Shell uses Amoco fuel to fulfill its Texas contracts with the airlines; Amoco's consideration is the right to use Shell fuel elsewhere. The fuel is shipped directly from the supplier, Amoco, in Illinois to the buyers, the airlines (through their agent, Allied), in Missouri. Delivery is made via a third party pipeline carrier. Shell's only involvement with the fuel is in the necessary technical passage of title simultaneously from supplier to middleman to broker at the time of delivery. It is stipulated that Shell has no physical facilities or employees in St. Louis County, or anywhere else in Missouri, related in any way to these sales.

Nothing in these facts supports the proposition, urged by Appellee and the United States, that the sales are purely *intra*state. Indeed, this Court's decisions clearly hold that such middleman activities are in interstate commerce, both where the goods are shipped directly from the supplier in one state to the buyer in another without going through the hands of the middleman, *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U.S. 52, 63-64 (1927), and when the middleman physically possesses the goods in the buyer's state before transferring them to the buyer, *People's Natural Gas Co.* v. *Public Service Commission*, 270 U.S. 550, 552-54 (1926). Holding Shell liable for county sales taxes would subject all interstate middlemen to state and local sales taxes on like sales made in interstate commerce.

The United States points to three factors that it contends make the sales in question purely intrastate. First,

it points out that title passes from Shell to the airlines at the Airport, and it complains that Shell did not own the fuel until it was present in Missouri. Brief of Amicus Curiae, at 9-10. Second, it states that Shell delivers the fuel at the Airport. *Id.*, at 10. Third, it argues that the fuel orders are placed at the Airport. *Id.*

With regard to the fuel orders, the United States has mischaracterized the facts. It states that "orders for particular quantities of fuel . . . were placed by the airlines through Allied's employees, presumably at the airport, who passed on the orders and controlled the deliveries." *Id.* The presumption that the orders are placed at the Airport is unsupported by the stipulation of facts,[1] and the statement that Allied's employees merely "passed on the orders" is misleading. The airlines do not order the fuel from Allied. Allied, as the *airlines'* agent, requests delivery of the fuel directly from the Amoco Oil Company refinery in Illinois. *Id.* paras. 5, 17. The fuel is delivered into an interstate carrier pipeline owned and operated by third parties. *Id.* paras. 7-10. Since Shell has no personnel or facilities at the Airport, or anywhere else in Missouri, involved in the aviation fuel sales, *id.* para. 19, it is clear that orders are not placed at the Airport. Delivery requests are made directly to an out-of-state location, the Amoco refinery in Wood River, Illinois. Indeed, there is no other place to which they can be made, since the pipeline runs from the refinery. *Id.* para. 5.

The United States' argument regarding delivery of the fuel, *see* Br. of Amicus Curiae, at 10, 11, likewise mischaracterizes the transactions by omitting portions of the

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[1] The stipulation of facts is reprinted as an Appendix to the Brief of the United States as Amicus Curiae. Citations here to the stipulation are by paragraph number.

stipulated facts and purporting to supply others. Shell does *not* deliver the fuel. The fuel is delivered by, and through, third party pipeline carriers in which Shell has no economic or proprietary interest. Stip. paras. 5, 7-8.[2] Thus it *does* matter that the Supreme Court of Missouri based its findings of Shell's presence in St. Louis County on the asserted agency of the parties responsible solely for delivery of the fuel, *see* Juris. Statement, at 13-14, since an out-of-state seller may not be subjected to taxation when its only contact with the taxing jurisdiction is through a third-party carrier, *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753, 758 (1967); *Norton Co.* v. *Department of Revenue*, 340 U.S. 534, 539 (1951).[3] The United States' suggestion that Shell has a

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[2] The United States quotes that portion of the stipulation stating that Shell's agreements with Amoco Oil Company "allow appellant to 'deliver aviation fuel at the airport.'" Br. of Amicus Curiae, at 10. The stipulation actually states that those agreements permit Shell to "deliver aviation fuel at the airport *via pipeline from the Amoco Oil Company refinery at Wood River, Illinois.*" Stip. para. 5. The stipulation furthermore makes it clear that the pipeline is owned and operated by unrelated third parties. *Id.* paras. 7-8.

[3] The United States attempts to distinguish *National Bellas Hess* and *Norton* on two grounds, neither of which is valid. First, it argues that in those cases the purchasers ordered goods that they "knew would come from the seller's out-of-State stock." Br. of Amicus Curiae, at 11. Nothing in the opinions in those cases, however, indicates that the purchasers had any knowledge whether the goods would in fact be shipped from out of State; indeed, Norton Company even maintained in-State stores, and its purchasers might logically have assumed that the goods would be routed from one of the in-State facilities. More importantly, it makes no diffference here. Contrary to the contention of the United States, *id.*, at 11-12, the airlines do not request fuel delivery "without regard to the source of the fuel." Allied, and through it the airlines, are well aware that the fuel comes from Amoco's refinery in Illinois, since the pipeline runs from the

direct contractual arrangement with the carriers, *see* Br. of Amicus Curiae, at 11, is wholly unsupported by the stipulation. Shell's only agreement is with Amoco Oil Company. Stip. para. 5.

The passage of title from Shell to the airlines in Missouri, *see* Br. of Amicus Curiae, at 10-11, simply cannot be enough to render the sales intrastate. The United States argues that "it would be consistent with this Court's decisions to identify the place of passage of title, or ownership, as the single determinitive factor that fixes the location for a particular sale." *Id.*, at 8. Such a test, however, would be illogical in the context of an interstate sale. Title must necessarily pass somewhere. A test that looks to nothing other than passage of title would effectively preclude any finding of interstate commerce, since under such a test one state or another would always have authority to tax the sale. As for the argument that Shell did not own the fuel until the fuel was present in Missouri, *id.*, at 10, 12, the none too short answer is that this Court has repeatedly said that the mere passage of title during movement of the goods to their intended destination does not alter the interstate character of the entire transaction. *E.g.*, *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 169 (1954); *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498, 503-04 (1942); *East Ohio Gas Co.* v. *Tax Commission*, 283 U.S.

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refinery and it is Amoco's meter that measures the fuel as it leaves the pipeline. Stip. paras. 5, 9.

Second, the United States argues that in neither *National Bellas Hess* nor *Norton* "is there any suggestion that title to the shipped goods was passed to the purchaser within the taxing State." Neither, of course, is there any indication that it was not. But in any event, as discussed below, the mere passage of title cannot, of itself, determine whether sales are or are not interstate.

465, 470 (1931); *People's Natural Gas Co.*, 270 U.S., at 554.

The United States contends that it is irrelevant that the fuel was obtained from an out-of-State supplier and that it was delivered by third parties unrelated to Shell. Br. of Amicus Curiae, at 10. It is wrong on both points. As noted above, *see* note 3, *supra*, since the pipeline runs from the Amoco refinery and Amoco's meter measures the fuel at the Airport, Allied, and through it the airlines, are well aware that the fuel must be shipped from Illinois, and they obviously contemplate that it will be. Hence *Wiloil Corp.* v. *Pennsylvania*, 294 U.S. 169 (1935), has no application. Where, as here, it is contemplated that the goods will be shipped to the buyer from an out-of-State source, the transaction is interstate in character. *Pacific States Paper*, 273 U.S., at 65. *See Flanagan* v. *Federal Coal Co.*, 267 U.S. 222, 225 (1925). Neither are *Sonneborn Brothers* v. *Cureton*, 262 U.S. 506 (1923), and *J. Bacon & Sons* v. *Martin*, 305 U.S. 380 (1939), apposite, for in those cases the interstate transportation had ended and the goods were in the physical control of the seller for further disposition within the taxing jurisdiction. Such is not the case here, where the interstate transportation continues uninterrupted until the aviation fuel reaches the ultimate consumers (or their agent, Allied). *See People's Natural Gas Co.*, 270 U.S., at 554. *Cf. Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 569 (1943) (even temporarily *holding* goods in warehouse does not end interstate journey where there is a "practical continuity" of movement from out-of-State supplier, through warehouse, and on to customers whose prior orders or contracts are being filled). Insofar as delivery by unrelated third parties is concerned, the United States' reliance on *Memphis Gas Co.* v. *Beeler*, 315 U.S. 649 (1942), is sim-

ilarly misplaced, for there the taxpayer's activities "went beyond the mere sale, to a distributor, of gas in interstate commerce," since the taxpayer also participated with the purchasers "in the business of distributing the gas to consumers after its delivery" to the purchaser, *id.*, at 656.

The United States concedes that which the Supreme Court of Missouri failed to recognize: that this case deals with an attempt to impose a *sales* tax directly on the seller, Shell, rather than require the seller to collect a *compensating use* tax imposed upon the purchaser. *See* Br. of Amicus Curiae, at 12 n. 12. Shell has never disputed its obligation to collect and pay over compensating use taxes on the sales in question, and in fact it has done so with regard to taxes due the State itself. Stip. para. 24. But Missouri has not authorized St. Louis County to impose a *local* compensating use tax. Thus, regardless whether Shell has unrelated Missouri activities to support imposition of the duty to collect use taxes, *see National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 560-61 (1977), the absence of any Shell facilities or personnel in St. Louis County, or elsewhere in Missouri, in any way related to the aviation fuel sales in question, Stip. para. 19, precludes imposition of a direct tax against Shell on those sales, *Norton*, 340 U.S., at 537, 539; *see National Geographic*, 430 U.S., at 560-61.

In short, Shell's sales are interstate, and the factors upon which the United States relies do not constitute a nexus sufficient to satisfy the requirements of the first prong of the test enunciated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). The requests for delivery of the fuel are placed to an out-of-State location, the Amoco refinery, and hence are not intrastate. Delivery is made by third party carriers having no relationship

to Shell. And while title passes from Shell to the airlines at the Airport, that fact, alone, is not determinative. It is absurd even to suggest that Shell "could not conceivably be described as an out-of-State seller." Br. of Amicus Curiae, at 12.[4] The transactions here are typical middleman-type sales in interstate commerce. *See Pacific States Paper*, 273 U.S., at 63-64; *People's Natural Gas Co.*, 270 U.S., at 552-54. To hold otherwise would be to subject all like sellers to State or local sales taxes regardless of the interstate nature of their businesses.

B. The Discrimination Against Interstate Commerce.

The United States' discussion of Shell's discrimination argument misapprehends Shell's position. The applicable Missouri statutes provide (1) that for purposes of local sales taxes, "all retail sales shall be deemed to be consum-

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[4] Other incidents of the sales, which the United States either ignores or misstates, further demonstrate the interstate nature of the transactions. Shell's contracts with the airlines, pursuant to which the airlines request delivery of the fuel, are accepted and executed by Shell in Houston, Texas. Stip. para. 3. The exchange agreements are accepted by Shell in Houston and by Amoco in Chicago, Illinois. *Id.* para. 5. And contrary to the assertion that the fuel deliveries are "billed at the time of delivery," Br. of Amicus Curiae, at 10, Shell bills the airlines for the fuel from its Chicago Administrative Complex in Oak Brook, Illinois, Stip. para. 20. Allied tenders copies of the meter tickets to the airlines and sends copies to Shell's administrative complex, but it is Shell that does the billing. *Id.* paras. 16, 20.

Billing and payment are, of course, integral parts of the sales transactions. The Supreme Court of Missouri has clearly stated that for purposes of local sales taxes, sales are not consummated until payment is made. *Mobil-Teria Catering Co.* v. *Spradling*, 576 S.W.2d 282, 284 (Mo. 1978) (en banc). *See* Appellant's Reply to Appellee's Motion to Dismiss or Affirm, at 4 & n.3.

mated at the place of business of the retailer"[5] and (2) that if a seller "has more than one piece of business" in Missouri that "participates in the sale, the sale shall be deemed to be consummated at the place of business of the retailer where the initial order" is taken. MO. REV. STAT. §§ 66.615.5, 94.620.5 (1978 & Cum. Supp. 1984). The United States discusses the second of these provisions. Br. of Amicus Curiae, at 13-14. Shell's argument, however, addresses more the discriminatory application of the first.

Shell contended below that, under the plain language of the first provision, it is not subject to sales taxation in St. Louis County because it has no place of business there.[6] The Supreme Court of Missouri held that the first statutory "place of business" presumption applies only if the sales "might have a nexus with more than one municipality," *id.*, and although it had clearly applied that presumption previously, *Mobil-Teria Catering Co.* v. *Spradling*, 576 S.W.2d 282 (Mo. 1978) (en banc), it distinguished *Mobil-Teria* on the ground that in that case the only jurisdictions involved were "local." App. to Juris. Statement, at 5a. Hence by interpretation the Supreme Court of Missouri read into the first statutory "place of

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[5] Appellee's own regulations provide that this presumption is conclusive and operates "without regard to the location of point of passage of title" or the place of delivery. 12 C.S.R. 10-5.545 (1977) (App. to Juris. Statement, pp. 36a-37a). The Supreme Court of Missouri has held that the presumption is conclusive. *Fabick & Co.* v. *Schaffner*, 492 S.W.2d 737, 745 (Mo. 1973).

[6] It is stipulated that Shell has no facilities or employees in St. Louis County, or anywhere else in Missouri, that participate in either the *sale* or the *delivery* of the aviation fuel in question. Stip. para. 19. Indeed, nothing in the record indicates that Shell has any physical presence in St. Louis County at all.

business" presumption a discrimination not present in the language of the statute itself: The favorable conclusive presumption that the sales are consummated at the seller's place of business, without regard to the location of delivery or passage of title, applies only if the seller's place of business is in Missouri.[7]

As discussed above, it is clear that Shell has no place of business in St. Louis County related to the sales in question. It has no physical presence there. The asserted "agents," which the Supreme Court of Missouri did not identify but upon which it based its unexplained conclusion that Shell "maintains a continuing presence" at the Airport, *id.*, at 8a, could be nothing other than the unrelated companies responsible for delivery—the pipeline companies and Amoco, which owns the meter at the end of the pipeline.[8] Under this Court's decisions, however, where the asserted connection with the taxing jurisdiction exists solely through independent instrumentalities of delivery, there is effectively no nexus at all. *National*

[7] That the majority of the Supreme Court of Missouri considered this result may be inferred from the fact that the dissent specifically raised the point, arguing that the place of business presumption "serves to ease administration of both *intra*state and *inter*state . . . commerce transactions." App. to Juris. Statement, at 10a.

[8] The Missouri Administrative Hearing Commission originally sought to base a finding of a presence for Shell in St. Louis County upon the passage of the fuel through Amoco's fuel meter at the Airport end of the pipeline. *See* App. to Juris. Statement, at 24a. In an identical case involving Amoco, however, the Circuit Court of Cole County, Missouri, held that the same fuel meter did *not* constitute a place of business for Amoco itself, and thus Amoco was held not liable for the same taxes that Appellee now seeks to impose against Shell. *Amoco Oil Co.* v. *King*, No. CV184-661CC, slip op. at 7 (Mo. Cir. Ct. Cole County Dec. 18, 1984). Appellee did not appeal, and thus has acquiesced, in that decision.

Bellas Hess, 386 U.S., at 758; *Norton*, 340 U.S., at 539. *See Miller Brothers* v. *Maryland*, 347 U.S. 340 (1954). Hence the decision of the Supreme Court of Missouri at best is a misapplication of this Court's cases interpreting the nexus requirement. At worst, it creates in this case a discrimination against interstate commerce: Shell's place of business is entirely outside of Missouri, but Missouri nevertheless refuses to permit Shell the benefit of the conclusive statutory presumption that the sales are deemed consummated at the seller's place of business. Shell thus is required to pay St. Louis County sales and transportation sales taxes, even though it would not be required to do so if its place of business were within Missouri, but outside of St. Louis County.

C. This Court Should Note Probable Jurisdiction.

The United States' arguments are based upon a misinterpretation of the facts presented here. The position the United States advances, if adopted, would render intrastate those middleman-type transactions, such as Shell's in this case, that have heretofore always been considered interstate commerce. The questions presented are indeed substantial. This Court should note probable jurisdiction of Shell's appeal.

Respectfully submitted,

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